

SERVED: August 19, 1992

NTSB Order No. EA-3638

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of July, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10445
v.)	
)	
MARTIN J. QUINLAN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from an initial decision of Administrative Law Judge Jimmy N. Coffman, issued orally at the conclusion of an evidentiary hearing held on January 18, 1990.¹ By that decision the law judge affirmed in part an order of the Administrator suspending respondent's airline transport pilot (ATP) certificate for 60 days for alleged violations of sections

¹An excerpt from the transcript containing the initial decision is attached.

91.75(a) and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) stemming from a flight conducted on May 18, 1988, finding that respondent had violated only section 91.75(a) and reducing the sanction imposed against him to a suspension of 30 days.²

The basis for the Administrator's complaint is that respondent took off VFR from Raleigh Memorial County Airport in Beckley, West Virginia after having been told by the Charleston ATC facility to "hold for release" pursuant to an IFR clearance without having first canceled the clearance.

In his appeal brief, respondent contends that no clearance was in effect at the time of his takeoff because the consequence of his being told to "hold for release" was to place the clearance in abeyance until such time as he was released. In this regard, respondent argues that that direction was not part of the clearance but was, rather, an instruction, which may have

²The Administrator did not appeal either the law judge's determination that respondent had not violated FAR § 91.9 or the reduction in sanction. Thus, the sole question before the Board is whether respondent violated FAR § 91.75(a). That provision has since been amended and recodified as § 91.123(a). FAR § 91.75(a) as was in effect at the time of the incident read as follows:

"§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. However, except in positive controlled airspace, this paragraph does not prohibit him from canceling an IFR [instrument flight rules] flight plan if he is operating in VFR [visual flight rules] weather conditions. If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC."

prohibited him from proceeding IFR prior to being released but did not require him to cancel the clearance before taking off VFR. Respondent has also maintained that he directed his copilot, who was responsible for flight communications, to inform ATC that he would be taking off VFR, and has contended that he should not be held liable for violating FAR section 91.75(a) merely because that instruction was not carried out.

The Administrator has submitted a reply brief, in which he urges the Board to affirm the law judge's determination that respondent violated section 91.75(a).³

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the law judge's finding of a section 91.75(a) violation. Consequently, we will deny respondent's appeal.

In this case, it is undisputed that the Beckley airport does not have a control tower and that the Charleston ATC facility governed IFR arrivals and departures at that airport. It is also uncontroverted that respondent had previously filed an IFR flight plan and that VFR meteorological conditions prevailed at the

³A motion for leave to file an amicus curiae brief has been filed by the Aircraft Owners and Pilots Association (AOPA). We will deny that motion. In this regard, we note that our rules do not authorize amicus curiae appearances (see Administrator v. Rogers, 2 NTSB 473 (1973)) and there is no basis at this stage of the proceeding for accepting AOPA's motion as a petition to intervene (see id. and 49 C.F.R. § 821.9). Moreover, AOPA has not shown that it would bring to our consideration of this case any new or special insight that has not already been brought to light by the parties.

time of the incident. The evidence includes a transcript of the Charleston tower tape,⁴ which relates the following communications:

"Lear 448WC: Charleston approach lear forty eight
1813:25 whiskey charley is on the ground at
Beckley instrument to Philadelphia.

Charleston: Lear forty eight whiskey charley
Charleston approach clearance on request
* * * *

Charleston: Lear four four whiskey charley cleared
1813:45 to Philadelphia Airport as filed climb
and maintain one zero thousand expect
flight level two niner zero one zero
minutes after departure squawk six seven
zero three hold for release advise when
ready expect possible delay.

Lear 448WC: OK forty eight whiskey charley cleared
1814:10 to Philadelphia as ah filed climb to and
maintain one zero thousand expect two
nine zero ten minutes after six seven
zero three the squawk we'll advise when
we are ready eight whiskey charley

Charleston: Lear eight whiskey charley your readback
correct
* * * *

Lear 448WC: Ah Charleston lear forty eight whiskey
1815:29 charley is ah ready at Beckley and
we[']re going to depart one nine

Charleston: . . . four four eight whiskey charley
Charleston approach hold for release sir
youre number two for departure right
now traffic is on approach

Lear 448WC: Whiskey Charley
* * * *

[At 1818:58, King Air 2UV, which had been cleared

⁴Ex. A-7. Respondent's aircraft is Lear 448WC. Times were not included on the rerecorded tape from which the transcript was derived; thus, the times indicated in the transcript are approximate. See id. at 1.

for departure before respondent's aircraft and was released between 1817:25 and that time, reported that it was holding for another aircraft on final approach. King Air 2UV subsequently took off between 1820:11 and 1821:21.]

*	*	*	*	*
Lear 448WC: 1823:06	Uh this is Lear four four eight whiskey charley we departed VFR presently uh turning uh eastbound and we[']re just out of uh four thousand climbing			
*	*	*	*	*
Charleston:	OK I had a couple aircraft calling at the same time King Air nine two victor traffic one o'clock three miles northbound type and altitude unknown			
King Air 92V:	Nine two victor looking			
King Air 2UV:	Is that for two uniform victor mam if it is we have the lear in sight coming off Beckley			
Charleston:	OK the Lear jet departed VFR lear eight whiskey charley understand you did depart uh VFR sir			
Lear 448WC: 1823:10	Thats affirmative we[']re VFR presently climbing through five point five			
Charleston:	Lear eight whiskey charley roger theres a King Air two miles uh south of Beckley turning east bound you have him in sight			
Lear 448WC:	Thats affirmative			
*	*	*	*	*
Charleston:	. . . uh lear four eight whiskey charley squawk ident			
Charleston:	Lear eight whiskey Charlies radar contact five miles east of Beckley and uh you're ahead of that King Air now			
*	*	*	*	*
Charleston: [to Rainelle facility]	Yeah lear four four eight whiskey charlie uh departed Beckley VFR they had visual with each other and they're ok now anyway."			

Thus, the tower tape transcript reflects that respondent was given a clearance pursuant to his flight plan and, in connection therewith, was told by ATC to "hold for release." In support of his argument that this direction was not part of the clearance and that its effect was to place the clearance in abeyance pending release, respondent relies principally upon the following description of the term "hold for release" appearing in the glossary of the Airman's Information Manual (AIM):

"HOLD FOR RELEASE--Used by ATC to delay an aircraft for traffic management reasons; i.e., weather, traffic volume, etc. Hold for release instructions (including departure delay information) are used to inform a pilot or a controller (either directly or through authorized relay) that a departure clearance is not valid until a release time or additional instructions have been received."⁵

We must, however, point out that a somewhat different characterization of the term "hold for release" appears in the operational portion of AIM, where, in connection with departure procedures, it relates:

"HOLD FOR RELEASE--ATC may issue 'hold for release' instructions in a clearance to delay an aircraft's departure for traffic management reasons (i.e., weather, traffic volume, etc.). When ATC states in the clearance, 'hold for release,' the pilot may not depart until he receives a release time or is given additional instructions by ATC. In addition, ATC will include departure delay information in conjunction with 'hold for release' instructions."⁶

As the latter description of the term "hold for release" is found in the portion of AIM dealing with the actual conduct of

⁵AIM (March 5, 1992 ed.) Glossary-31.

⁶Id. ¶ 5.24 (emphasis added).

flights, we are of the opinion that it is entitled to greater weight in deriving the proper connotation of that term. That description strongly suggests that a direction to "hold for release" must be viewed as either a part of a clearance or an instruction integral thereto. In either case, the Board does not believe that the consequence of such a direction is to render a clearance ineffective until such time as a release is given.⁷ We cannot, therefore, concur with respondent's view that, under appropriate meteorological conditions, a pilot who is given an IFR clearance and is told to "hold for release" in connection therewith is free to take off VFR from an airport not having a control tower without first canceling that clearance.

Our view in this matter is reinforced by the facts of this case, which indicate that ATC expected respondent to either stay on the ground until released or cancel his clearance prior to takeoff. In this regard, we note that both the tower transcript and the testimony of a controller who was on duty at the Charleston ATC facility at the time of the incident indicate that respondent's departure from Beckley surprised ATC and caused disruption to the system of air traffic coordination. Indeed,

⁷Moreover, insofar as the description of "hold for release" appearing in the AIM glossary relates that a departure clearance "is not valid" until a release time is received, this can be interpreted to mean that a pilot cannot fly under the clearance before being given a release, rather than that the clearance is of no effect--and may therefore be disregarded--until that time. Such an interpretation would harmonize the glossary description of "hold for release" with that found in the operational portion of AIM.

the controller related that, in addition to making sure that respondent and the King Air aircraft had each other in sight, she was required to call the Indianapolis Center "real fast" to inform it of respondent's VFR departure.⁸ She further noted that respondent's takeoff caused the Charleston facility to divert its attention from other pressing air traffic matters and indicated that the strain on the system could have been avoided had respondent sought permission to depart VFR before taking off.⁹ Clearly, the interests of air safety were compromised in this case by respondent's failure to cancel his IFR clearance prior to departing VFR from Beckley.¹⁰

Turning to respondent's assertion that he should not be held in violation of section 91.75(a) because he asked his copilot to inform ATC that he would be taking off VFR, we note that, in his testimony, respondent related that he mistakenly believed that his copilot had informed ATC of his planned VFR departure.¹¹

⁸Tr. 22. According to the controller, Charleston is required to inform the Center of VFR departures prior to takeoff. Id.

⁹Tr. 22-24.

¹⁰In light of the above discussion, the Board is at a loss to explain the basis for the law judge's finding that respondent violated FAR § 91.75(a) but not § 91.9. Indeed, this is at odds with longstanding Board precedent holding that a derivative or residual violation of § 91.9 flows from the finding of an operational FAR violation. However, for reasons set forth in n.2, supra, no further discussion of that matter is warranted herein.

¹¹Respondent attributed this to the fact that the crew was not using headsets (due to the fact that the copilot had forgotten his) and that, as a result, he was unable to hear the copilot's transmissions because the cockpit speakers went silent

He has at no time, however, indicated that he would not have taken off had he known that his instruction was not carried out. Indeed, respondent has admitted that he asked his copilot to notify ATC of his planned VFR departure not out of a sense that it was necessary for him to provide such information to ATC but merely as a matter of "courtesy."¹² Moreover, respondent did not ask his copilot to confirm that the requested communication had been made prior to departing Beckley. Thus, this case differs from those cited by respondent in support of his contention that he should be exonerated from liability for a section 91.75(a) violation because of his copilot's inaction, and we find no support for his position on this matter.¹³

(..continued)

when the crewmembers' microphones were keyed. See Tr. 70-71. Respondent apparently assumed that the copilot transmitted the requested message to ATC when he saw the copilot talk into his microphone shortly after the request was made. See *id.* 85. We note that the copilot was deposed as a witness for respondent several days before the hearing but was not at that time asked either to confirm whether he had been directed by respondent to inform ATC of the flight's impending VFR departure or to explain why such an instruction, if made, was not carried out.

¹²Tr. 85. In this regard, we also note that respondent has testified that he did not instruct his copilot to either cancel his IFR clearance or ask for an amendment thereto. *Id.* 74.

¹³The cases cited by respondent in favor of his position are Administrator v. Coleman, 1 NTSB 229 (1968) and Administrator v. Thomas, 3 NTSB 349 (1977). Coleman and Thomas involved pilots who did not hear or understand ATC instructions and, upon checking with their copilots, were provided with readbacks of such instructions which proved to be incorrect. Another case germane to this issue is Administrator v. Crawford, 5 NTSB 1000 (1986), where a pilot directed his copilot to request reconsideration of a "go around" clearance which the copilot relayed inaccurately (telling ATC that another aircraft which had been on the runway was "turning off [and] we're landing"), and ATC responded "Roger," followed by a windcheck. There, the Board found that the controller had unwittingly reinforced the pilot's

With respect to the matter of sanction, the Board believes that the 30-day suspension ordered by the law judge is wholly appropriate for the FAR violation established in this case and we will, therefore, affirm that suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order as modified by the law judge in his initial decision is affirmed; and
3. The 30-day suspension of respondent's ATP certificate shall begin 30 days from the date of service of this order.¹⁴

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member HART submitted the following dissenting statement.

(..continued)
mistaken belief that his copilot correctly relayed his request for reconsideration of the "go around" clearance. 5 NTSB at 1002. The common thread in each of those cases is that the pilots would not have acted as they did but for their justifiable reliance upon the actions of others. That element is lacking in this case. As noted above, we do not discern either that respondent had taken the necessary steps to assure that the requested message was in fact broadcast by his copilot--thus, no justifiability--or that he would have refrained from taking off had he known that his copilot failed to inform ATC of his intention to depart VFR--thus, no reliance.

¹⁴For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

DISSENT BY ME-3
REGARDING NOTATION NO. 5796
July 23, 1992

Dissenting Opinion by Member Hart: I do not believe that a suspension is warranted here because (a) this is a case of first impression regarding an issue on which reasonable people can differ, (b) there is no indication of any intent to circumvent the intent of the FARs, and (c) Respondent's VFR takeoff created less hazard than if, as is legally permissible, he had not talked to ATC at all.

The threshold issue is whether Respondent's clearance was active when he took off VFR. Clearly it would have been good operating practice to advise ATC before taking off VFR. However, reasonable people can differ as to whether a clearance with a future activation time is an active clearance, as when ATC said, ". . . hold for release advise when ready expect possible delay," without giving any further instructions. Under these circumstances, Respondent's failure to use good operating practice does not, in my view, rise to the level of a violation because there was not yet an active clearance from which Respondent could deviate.

Looking to the Airman's Information Manual for guidance on this issue presents two problems. First, the AIM is neither a creature of statute or regulation and is not necessarily determinative on questions such as this. Second, the majority's interpretation of the two quoted AIM provisions is reasonable, but because the controller had no authority to require a VFR aircraft in uncontrolled VMC airspace to do or not do anything, it is also reasonable to interpret the two provisions to mean simply that the pilot could not rely upon the IFR clearance until receiving a release time.

In addition, Respondent was not required by the FARs to communicate with anyone to take off VFR. By talking to ATC and making the controller aware of his presence, his takeoff was less hazardous than if he had not communicated with her at all. The ATC transcript does not suggest that the controller had a problem with Respondent's action, and no other pilot on the frequency complained that he created a hazard. Thus, the majority's result would encourage a less safe mode of operation because Respondent would have been less likely to incur a violation if he had not communicated with ATC.

Finally, there is no implication in the record of any effort to circumvent the letter or spirit of the FARs.

In view of the above, even if the better view were that the IFR clearance prevented Respondent from taking off VFR before its activation time - which I do not concede - I do not believe that Respondent's license should be suspended for his not-unsafe, non-circumventing action on an issue of first impression under the FARs on which reasonable people can differ.